NOTICE OF INTENT TO ADOPT AN ADVISORY OPINION OF THE GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION

TO ALL INTERESTED PERSONS AND PARTIES:

Notice is hereby given that pursuant to the authority set forth below, the Georgia Government Transparency and Campaign Finance Commission (hereinafter "Commission") proposes to adopt:

Advisory Opinion No. 2020-03

This notice, together with an exact copy of the proposed advisory opinion is being mailed to all persons who have requested, in writing, that they be placed on a mailing list. A copy of this notice, and an exact copy of the advisory opinion may be reviewed between the hours of 8:30 a.m. to 4:30 p.m. Monday through Friday, except official State holidays, at the Georgia Government Transparency and Campaign Finance Commission, 200 Piedmont Avenue SE, Suite 1416 - West Tower, Atlanta, Georgia 30334. These documents will be available for review on the Georgia Government Transparency and Campaign Finance Commission website (www.ethics.ga.gov). Additional copies may be requested by contacting the Commission at 404-463-1980.

A public hearing is scheduled to begin at 10:00 AM on August 6, 2020 in Room 606 at the Coverdell Legislative Office Building, 18 Capitol Square SW, Atlanta, GA 30334 to provide the public an opportunity to comment upon and provide input into the proposed advisory opinion. At the public hearing anyone may present data, make a statement, comment, or offer a viewpoint or argument whether orally or in writing. Lengthy statements or statements of a considerable technical or economic nature, as well as previously recorded messages, must be submitted for the official record. Oral statements should be concise and will be limited to five (5) minutes per person. Written comments are welcome. Such written comments must be legible and signed, and should contain contact information from the maker (address, telephone and/or facsimile number, etc.). To ensure their consideration, written comments must be received on or before August 4, 2020. Written Comments should be addressed to Katie Easterwood, Legal Administrative Assistant, Georgia Government Transparency and Campaign Finance Commission, 200 Piedmont Avenue SE, Suite 1416 – West Tower, Atlanta, Georgia 30334. Fax: 404-463-1988.

The proposed advisory opinion will be considered for adoption by the Commission at its meeting scheduled to begin at 10:00 a.m. on August 6, 2020 at the Coverdell Legislative Office Building, Room 606, 18 Capitol Square SW, Atlanta, GA 30334.

The Georgia Government Transparency and Campaign Finance Commission has the authority to adopt this advisory opinion pursuant to authority contained in O.C.G.A. § 21-5-6(b)(13).

This 24th day of July, 2020.

Robert S. Lane, Deputy Executive Secretary

PROPOSED

GEORGIA GOVERNMENT TRANSPARENCY & CAMPAIGN FINANCE COMMISSION

Advisory Opinion

No. 2020-03

In response to an advisory opinion request on April 7, 2020, from Mr. Douglas Chalmers, Jr., the Georgia Government Transparency and Campaign Finance Commission advises that a legislator, including other public officers and candidates for elected public office, may not utilize campaign funds (which includes "contributions" as defined by the Georgia Government Transparency and Campaign Finance Act) to pay for rent or lodging expenses in real property that is owned, in whole or in part, by the legislator, public officer, candidate for public office, spouse of the same, or a corporate entity that is owned in whole or in part by the same, as such a transfer of campaign funds is tantamount to a conversion of campaign funds into personal assets which is prohibited by the Act pursuant to O.C.G.A. § 21-5-33(c).

With respect to the use of campaign funds for the payment of rent or lodging expenses in real property that is owned by other family members of the public officer/candidate, to wit: children, siblings and in-laws, or corporate entities owned by the same, the Commission advises that such payments may be permitted by the Act as ordinary and necessary expenses which are not subsequently converted to a public officer's/candidate's personal assets, however, the legality of such payments would turn upon the specific facts of the ownership of the real property and/or the corporate entity owning said real property.

Question Presented in Request for Advisory Opinion 2020-03

(1) May a state legislator who lives outside Atlanta and who would otherwise use campaign funds to pay for lodging in Atlanta in connection with (a) the legislative session, (b) the performance of his or her official duties, and/or (c) campaign events and activities, pay for lodging for those purposes in real property that is owned by the legislator or by an immediate family member of the legislator, or that is owned by a corporation or limited liability company that is in turn owned by the legislator or an immediate family member of the legislator? For purposes of this request, the term "immediate family member" has the same meaning given to it by the Commission in Advisory Opinions 2012-04 and 2012-06, specifically "the father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law" of the legislator.

Factual Background

In a letter dated April 7, 2020, Mr. Douglas Chalmers, Jr. seeks guidance as to whether state legislators (hereinafter "public officer" or "public officer/candidate") may, in compliance with the Georgia Government Transparency & Campaign Finance Act (Act), use campaign funds to pay for lodging in real property that is owned by the legislator or a family member of the legislator or by a corporation owned in whole, or in part, by the public officer/candidate or a family member of the public officer/candidate. In his request, Mr. Chalmers correctly notes that the Act does permit a public officer to utilize campaign funds, as an ordinary and necessary expense, to pay for rent and/or lodging expenses related to the public officer's attendance of (a) legislative sessions of the General Assembly, (b) an event or act which constitutes the performance of the public officer's official duties related to their office, and (c) campaign events and activities related to the public officer's attempt to seek or retain their elected office. *See* O.C.G.A. § 21-5-3(18) ("Ordinary and necessary expense" defined as expenditures made during the reporting period for qualifying fees, office costs and rent, lodging, equipment, travel [...].), see also, O.C.G.A. § 21-5-33(a) ("Contributions to a candidate, a campaign committee, or a public officer holding elective office and any proceeds from investing such contributions shall be utilized only to defray ordinary and necessary expenses [...] incurred in connection with such candidate's campaign for elective office or such public officer's fulfillment or retention of such office"). However, Mr. Chalmers' request does not seek confirmation about what has previously been deemed an ordinary and necessary expense. Instead, this is the second instance wherein the Commission has been asked to provide guidance on whether a public officer/candidate may utilize campaign funds for a service which, nominally would be ordinary and necessary campaign expenses, has the ultimate effect of converting campaign funds into personal assets of the public officer/candidate.

Discussion & Legal Analysis

When the General Assembly adopted the Ethics in Government Act (the precursor to the current Georgia Government Transparency and Campaign Finance Act), the Georgia General Assembly sought to restrict not only the amount and period of time that a public officer/candidate could solicit and accept campaign contributions, but also the ability of said persons to expend campaign funds during their campaigns for elected public office. *See*, O.C.G.A. § 21-5-33(a), (c) (limiting the use of campaign funds for ordinary and necessary campaign expenses and holding that campaign funds shall not constitute the personal assets of a candidate). *See e.g.,* O.C.G.A. §§ 21-5-41 (setting maximum campaign contribution limits for each election cycle); and 21-5-43 (establishing accounting standards to limit the time frame that contributions may be accepted).

As presently drafted, the Act holds that "Contributions to a candidate, a campaign committee, or a public officer holding elective office and any proceeds from investing such contributions shall be utilized only to **defray ordinary and necessary expenses** [...] incurred in connection with

such candidate's campaign for elective office or such public officer's fulfillment or retention of such office."[1] O.C.G.A. § 21-5-33(a) (emphasis added). To further assist public officers/candidates with delineating what is and is not an "ordinary and necessary expense" the General Assembly defined said expenses as including, but not limited to:

> [...] expenditures made during the reporting period for qualifying fees, office costs and **rent**, **lodging**, equipment, travel, advertising, postage, staff salaries, consultants, files storage, polling, special events, volunteers, reimbursements to volunteers, repayment of any loans received except as restricted under section (i) of Code Section 21-5-41 [maximum contribution limits], contributions to nonprofit organizations, flowers for special occasions, which shall include, but are not limited to, birthdays and funerals, attorney fees connected to and in the furtherance of the campaign, and all other expenditures contemplated in Code Section 21-5-33.

O.C.G.A. 21-5-3(18) (emphasis added).

Over time, the Commission has been presented with several requests to delineate what constitutes an ordinary and necessary expense when campaign expenses fall outside of the Act's delineated definition of what constitutes ordinary and necessary expenses. One of the first requests to the Commission for an advisory opinion seeking such a delineation was issued on July 26, 2007 and related to the use of campaign funds to pay for a public officer's retirement party. In its inaugural opinion on this issue, the Commission held that:

> Although one definition of 'fulfill' is "to bring to an end," we believe that fulfillment of office relates to the obligations of the public officer in the context of their public responsibilities, and a retirement party **does not fulfill judicial obligations or responsibilities**. Therefore, campaign contributions **should not** be used for the purpose of hosting the retirement party of a judge.

S.E.C. AO 2007-03 (2007) (emphasis added).

In a subsequent opinion request, the Commission was presented with a hypothetical regarding the use of campaign funds by an elected public officer for the creation and funding of a legal defense fund to assist in the paying of legal fees arising from challenges to the election of a political party's officers. In its opinion, the Commission held that the use of campaign funds, as posited in the

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[1] Contribution is defined as "[A] gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in this state or in a county or a municipal election in this state. The term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. The term "contribution" shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office. The term "contribution" shall also encompass transactions wherein a qualifying fee required of the candidate is furnished or paid by anyone other than the candidate." O.C.G.A. § 21-5-3(7).

request's hypothetical, "[Did] not appear to be related to a [public officer's] campaign for office or to the fulfillment or retention of office sufficient to qualify [the expenditure] as a permitted expenditure under O.C.G.A. § 21-5-33(a)." S.E.C. AO 2007-08 (2007). But *cf.* S.E.C. AO 2007-07 (2007) (held, *inter alia*, that the use of campaign funds for expenses related to the use of private aircraft, if related to a public officer's fulfillment or retention of office, were ordinary and necessary expenses authorized by the Act). More recently the Commission was presented with two requests which posited similar hypotheticals regarding the use of campaign funds for the use of private aircraft, for campaign purposes, where the public officer/candidate or the public officer's/candidate's spouse owned an interest in said aircraft. In its consolidated advisory opinion, the Commission held that:

> (1) In the case of travel on an aircraft that is **owned or leased under a shared-ownership or other time-share arrangement**, where the travel does not exceed the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the candidate must pay and report the hourly, mileage, or other applicable rate charged the candidate or immediate family member for the costs of the travel; or
> (2) In the case of travel on aircraft that is **owned or leased under a shared-ownership or other time-share arrangement**, where the travel exceeds the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the candidate must pay and report the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size.

S.E.C. AO 2012-04 / 2012-06 (2012) (emphasis added).

The Commission notes that the guidance previously provided in S.E.C. AO 2012-04 / 2012-06 *supra* authorized the expenditure of campaign funds for rental fees and other "applicable charges" that were outside of the "proportional share of ownership interest" that belonged to the public officer/candidate or the public officer's/candidate's family member. Thus, any funds utilized in conformity with the aforementioned guidance would have no material effect upon the public officer's/candidate's or the public officer's/candidate's family member's financial interest in the owned aircraft as the fees paid would not alter, either in an increase or decrease, the fractional ownership interest or overall net value of the financial interest owned by the same in the aircraft. The Commission also takes notice of its most recent advisory opinion regarding the use of campaign funds for ordinary and necessary expenses wherein the Commission expressly forbid the use of campaign funds for the purchase of home security systems by public officers as such an expense "[…] would constitute permanent capital improvements [of] an elected official's personal residence." C.F.C. AO 2014-03 (2015) (Further holding that the cost of installing a security system in a public officer's personal residence would not be incurred in connection with such officer's campaign for elected office or fulfillment or retention of such office).

In the request presently before the Commission, Mr. Chalmer's has correctly noted that a public officer/candidate may lawfully use campaign funds for rent and lodging as permitted by O.C.G.A.

§ 21-5-33(a) as such expenses are explicitly deemed "ordinary and necessary expenses" by the Act pursuant to O.C.G.A. § 21-5-3(18). In instances where the public officer/candidate is using campaign funds to pay for rent and lodging in real property in which they do not have a financial interest, there is no bar raised by the Act against the use of said funds as it relates to the individual's campaign for elected public office or a public officer's fulfillment or retention of such office. However, in the hypothetical presented to the Commission, the effect of paying rent and/or lodging expenses for real property that is owned by the public officer/candidate or by a spouse of the public officer/candidate or by a company owned in whole or in part by the public officer/candidate or their spouse would have the effect of transferring campaign funds to the public officer/candidate, thereby converting campaign funds into personal assets of the public officer/candidate. While a public officer/candidate may argue that the use of campaign funds would have no impact upon their financial interests, such an argument would ultimately fail as any rental funds paid from campaign funds would be directly paid to the public officer/candidate or to the spouse of the public officer/candidate or to a company owned by the same. In each instance, the campaign funds would ultimately become personal assets of the public officer/candidate either through direct payments or through the accrual of marital assets (in the instance of payments to a spouse alone) or through the accrual of corporate funds which are primarily owned by the public officer/candidate and/or their spouse.[2] [3] While the General Assembly did not adopt a personal use prohibition in keeping with the Federal Elections Campaign Act (FECA),[4] the General Assembly did clearly mandate that "[c]ontributions and interest thereon, if any, **shall not constitute personal assets** of such candidate or such public officer." O.C.G.A. § 21-5-33(c) (emphasis added). Accordingly, the Commission finds that the use of campaign funds to pay for lodging in real property that is owned, in whole or in part, by the legislator, public officer, candidate for public office, a spouse of the same, or a corporate entity that is owned in whole or in part by the same, is prohibited by the Act as such a transfer of campaign funds is tantamount to a conversion of campaign funds into personal assets.

With respect to Mr. Chalmer's request as it relates to the use of campaign funds for the payment of rent or lodging expenses for real property that is owned by other family members of the public officer/candidate, to wit: children, siblings and in-laws, or corporate entities owned by the same, the Commission finds that such payments may be permitted by the Act as ordinary and necessary expenses which are not subsequently converted to a public officer's/candidate's personal assets,

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[2] Under Georgia law, marital property that is separately titled in one spouse is still subject to equitable division of property in the event of a divorce of the parties if martial funds were used to maintain the property or are used to contribute to the increased value of the real property. *See generally*, *Marrow v. Marrow*, 272 Ga. 557 (2000) (Appreciation in value of the home during the marriage as a result of the efforts of the couple is a marital asset subject to equitable division).

[3] This advisory opinion does not address the use of campaign funds which are used to pay for rent and lodging in real estate that is owned by a corporate entity in which the public officer/candidate and/or the public officer's/ candidate's spouse has a minority interest in the corporate entity (e.g. ownership in Mid-America Apartment Communities, Inc.).

[4] Under FECA, the use of campaign funds for the payment of home mortgages, rent and utility payments is expressly prohibited. *See* 52 USCS § 30114(b).

however, the legality of such payments would turn upon the specific facts of the ownership of the real property and/or the corporate entity owning said real property.

Conclusion

The Georgia Government Transparency and Campaign Finance Commission advises that legislators, including other public officers and candidates for elected public office, may not utilize campaign funds (which includes "contributions" as defined by the Georgia Government Transparency and Campaign Finance Act) to pay for rent or lodging expenses for real property that is owned, in whole or in part, by the legislator, public officer, candidate for public office, spouse of the same, or a corporate entity that is owned in whole or in part by the same, as such a transfer of campaign funds is tantamount to a conversion of campaign funds into personal assets which is prohibited by the Act pursuant to O.C.G.A. § 21-5-33(c).

With respect to the use of campaign funds for the payment of rent or lodging expenses for real property that is owned by other family members of the public officer/candidate, to wit: children, siblings and in-laws, or corporate entities owned by the same, the Commission advises that such payments may be permitted by the Act as ordinary and necessary expenses which are not subsequently converted to a public officer's/candidate's personal assets, however, the legality of such payments would turn upon the specific facts of the ownership of the real property and/or the corporate entity owning said real property.

This Advisory Opinion concerns the application of the Georgia Government Transparency and Campaign Finance Act, or regulations prescribed by the Georgia Government Transparency and Campaign Finance Commission, to the specific facts, transaction or activity set forth in Request for Advisory Opinion 2020-03.

Advisory Opinion 2020-03 is hereby adopted by the Commission in conformity with O.C.G.A. § 21-5-6(13) on August 6, 2020.

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Jake Evans
Chairman of the Commission

AO 2020-03 prepared by:

Robert S. Lane
Deputy Executive Secretary

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April 7, 2020

VIA EMAIL

David Emadi, Executive Secretary
Robert Lane, Deputy Executive Secretary
Government Transparency and Campaign Finance Commission
200 Piedmont Ave. SE
Suite 1402 - West Tower
Atlanta, GA 30334

Re: Advisory Opinion Request

Dear Messrs. Emadi and Lane:

Pursuant to O.C.G.A. § 21-5-6(b)(13), this is a request that the Commission issue an advisory opinion on the following question:

May a state legislator who lives outside Atlanta and who would otherwise use campaign funds to pay for lodging in Atlanta in connection with (a) the legislative session, (b) the performance of his or her official duties, and/or (c) campaign events and activities, pay for lodging for those purposes in real property that is owned by the legislator or by an immediate family member of the legislator, or that is owned by a corporation or limited liability company that is in turn owned by the legislator or an immediate family member of the legislator? For purposes of this request, the term "immediate family member" has the same meaning given to it by the Commission in Advisory Opinions 2012-04 and 2012-06, specifically "the father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law" of the legislator.

We respectfully submit that such payments are legal under the Government Transparency and Campaign Finance Act, O.C.G.A. § 21-5-1 et seq. (the "Act"). The Act permits the use of campaign contributions to defray "ordinary and necessary expenses" that are "incurred in connection with such candidate's campaign for elective office or such public officer's fulfillment or retention of such office." O.C.G.A. § 21-5-33(a). The definition of "ordinary and necessary expenses" includes lodging. O.C.G.A. § 21-5-3(18). It is thus well-established that legislators may use campaign funds for lodging for campaign or official duties. It is also common for legislators who live outside Atlanta to rent property in Atlanta for those purposes, and to use campaign funds to cover the rent and utility payments.

The conclusion that this is legal should not change merely because the lodging is owned by the legislator, an immediate family member of the legislator, or a corporate entity owned by one or more of them. The Commission has long advised that campaign funds may be used to pay family members of a candidate for the fair market value of services or products provided to the candidate's campaign, and that an in-kind contribution might result in the absence of such payments. For example, in Commission Rule 189-3-.06(4)(a) and the advisory opinions cited therein, the Commission expressly permitted candidates to pay for non-commercial travel for campaign purposes on aircraft owned by either the candidate or an immediate family member of the candidate. See AO 2012-04 and 2012-06 ("Taking into account the provisions cited above and Advisory Opinion 2007-07, the Commission finds that a candidate is allowed to use campaign funds for expenditures for use of aircraft for campaign purposes under circumstances where the candidate or the candidate's spouse owns an interest in an airplane . . . .").

That same reasoning should permit candidates to pay for lodging for campaign or official purposes in property that is owned by the candidate or an immediate family member of the candidate, or by a corporate entity owned by one of them. While that is not exclusively true for candidates who live outside Atlanta and must obtain lodging in Atlanta for the legislative session and other official or campaign purposes, it clearly should be true for those individuals.

Thank you for your consideration of this advisory opinion request.

Sincerely,

/s/ Douglas Chalmers, Jr.

Douglas Chalmers, Jr.